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No. 92-.....

Supreme Court, U.S.
FILED
AUG 31 1992
OFFICE OF THE CLERK

In the Supreme Court

OF THE

United States

OCTOBER TERM 1992

PAUL B. CARPENTER,
Petitioner,
v.
UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Petitioner was convicted of committing RICO and Hobbs Act violations by (i) accepting political donations from an "undercover" FBI agent totalling $20,000, and (ii) allegedly "pressuring" political lobbyists to make political contributions to him. The questions presented are:

(1) Whether the official right extortion provision of the Hobbs Act is unconstitutionally vague and overbroad on its face and as applied by the Court of Appeals to petitioner's State political fund-raising conduct.

(2) Whether the Court of Appeals erroneously defined the "explicitness" and "official right" requirements of the Hobbs Act in conflict with the rule formulated in *McCormick v. United States*, 111 S.Ct. 1807 (1991).

(3) Whether, in this First Amendment case, the RICO statute is unconstitutionally vague on its face and as applied to petitioner's campaign financing conduct.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this action April 9, 1992, reversing and remanding a District Court judgment of conviction for Hobbs Act extortion, attempted Hobbs Act extortion, and conspiracy to commit Hobbs Act extortion. Finding that the District Court erred in instructing the jury that no explicit *quid pro quo* was required to establish "official right" extortion under the Hobbs Act — but defining the "explicitness" and "official act" requirements in conflict with the rule of *McCormick v. United States*, 111 S.Ct. 1807 (1991) — the Court of Appeals remanded the case to the District Court for retrial.

OPINION BELOW

The opinion of the Court of Appeals is not yet officially reported and is reproduced in Appendix A.

JURISDICTION

The Court of Appeals' Opinion was filed April 9, 1992. The Court of Appeals denied petitioner's timely petition for rehearing with suggestion for rehearing en banc June 8, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

The Hobbs Act, 18 U.S.C. § 1951 *et seq.*, provides:

Interference with commerce by threats or violence

(a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

(b) As used in this section —

(1) The term "robbery" means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

(2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

(3) The term "commerce" means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any

point outside thereof; all commerce between points within the same State through any place outside such State; and all other commerce over which the United States has jurisdiction.

(c) This section shall not be construed to repeal, modify or affect section 17 of Title 15, sections 52, 101-115, 151-166 of Title 29 or sections 151-188 of Title 45.

The Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961 *et seq.*, provides:

18 U.S.C. § 1961. Definitions

As used in this chapter —

(1) "racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year;

* * *

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal

within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income in acquisition of any interests in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this section.

STATEMENT OF THE CASE

A. Introduction

By quite different routes, both the trial court and the Court of Appeals have shackled petitioner with an unconstitutional stan-

dard for defining the distinction between legal and illegal campaign contributions.

The trial court did it by erroneously telling the jury that there need be no specific *quid pro quo* to establish extortion under color of official right (as there was not here).

The Court of Appeals did it by holding that "explicit" really means "clear and unambiguous" — even if the imaginary "*quid pro quo*" is not "verbally explicit." (App. A 6a.)

If petitioner constitutionally may be punished by a 12-year sentence for accepting what appeared to be a lawful political donation from an "undercover" FBI agent — concededly in the absence of an explicit promise or undertaking — merely because the FBI "pretend victim" self-servingly deludes himself into believing that he has a "clear and unambiguous" understanding that he is exchanging political money for an "official act," then no elected office-holder possibly can distinguish between those payments that legitimately may be accepted and those that must be refused. Yet the Court of Appeals held just that by re-writing the *McCormick* Court's definition of "explicitness," apparently fearful that a politician somewhere might "escape liability . . . with winks and nods." (App. A 6a.)[1]

Politicians tend to be pragmatic, not psychic. They are prodded to raise political money if they desire to retain office. They ought not be required to psychoanalyze the motives of their donors. Neither they nor their constituents, furthermore, should be penalized when they fail to foresee that a political donor "clearly" and "unambiguously" (but erroneously) understands that a political donation is given in return for favorable official action. Much less should they be sent to prison for accepting political money not anchored in an "explicit promise or undertaking."

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[1]The Court of Appeals' fear of absolving the "nodder" or "winker" from Federal criminal liability is misplaced. Blatant, explicit attempts to exchange money for an official act by an officeholder are dealt with by *McCormick*. All less explicit efforts could be — and in many states are — prohibited by laws limiting campaign contributions or by local corruption statutes.

As the Government concedes, the trial evidence was that Mr. Carpenter "did not directly say that he would vote for . . . legislation if he received money . . ." from anyone. (App. B. 26) From that, the only correct conclusion is that *McCormick* forecloses both the conviction and the remand for a new trial.

B. Statement of Facts

This case grows out of an "undercover" operation, the script for which required the FBI to entice John Shahabian, a self-described "political consultant," and, as the Government conceded in its summation at trial, a con man par excellence, to promote and work for the passage of a phony piece of legislation — written by the FBI — drafted to enable a bogus out-of-state company to establish a facility near Sacramento, California, for the importation of fresh shrimp. To finance this imaginary venture, the FBI's legislation revised California law to enable selected savings institutions to purchase Industrial Development Revenue Bonds issued for the benefit of the fake import facility. The FBI bill — known as A.B. 3773 — easily passed both houses of the California Legislature, but, at the "request" of the FBI, was vetoed by the Governor.

Petitioner had been a highly-respected Member of the California Assembly and Senate — with an impeccable record for 12 years — when his name was mentioned by Shahabian to the undercover agent well after Shahabian agreed to help the FBI pass its bill. Despite overwhelming evidence that Shahabian was nothing other than a con man, liar and cheat — and notwithstanding the total absence of any reason to suspect that petitioner was predisposed to commit a crime — the FBI encouraged and authorized Shahabian gratuitously to offer Mr. Carpenter a political contribution of $20,000, which Mr. Carpenter ultimately accepted, duly recorded, and reported in the manner prescribed by California law.

The initial Indictment was returned March 15, 1990, and, on August 3, 1990, a four-count Superseding Indictment charged petitioner with violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1961, *et seq.*, alleging

California bribery and official right extortion in six distinct and unrelated predicate acts (Count 1); with official right extortion and attempted official right extortion in violation of the Hobbs Act, 18 U.S.C. § 1951 (Counts 2 and 4); and with engaging in conspiracy in violation of 18 U.S.C. § 371 to commit official right extortion in connection with one of the RICO predicate acts (Count 3). (App. C.)

The assumption of the prosecution is that Congress intended to regulate State election campaign financing — activity squarely protected by the First Amendment — through the Hobbs Act and RICO, even where, as here, the elected official did not accept or solicit political contributions in exchange for a specific, identifiable *quid pro quo*. That assumption flatly was rejected by the decision in *McCormick v. United States*, which ruled that political donations are prosecutable under the Hobbs Act only, if at all, if they are "made in return for an explicit promise or undertaking . . . to perform or not to perform an official act." (Id. at 1816.)

Petitioner's exclusive defense at trial to the charges based on the FBI's political donations — which continues to be his defense to this day — was that he provisionally accepted the $20,000 contributions on the assumption no *quid pro quo* was expected or required. His proof at trial established that his decision to accept the contribution became final only when he properly could draw the conclusion that no unlawful demands or requests were made of him by anyone. That decision, of course, was protected by petitioner's absolute First Amendment right to receive expenditures for political expression. *See Buckley v. Valeo*, 424 U.S. 1, 21 (1976), and *McCormick, supra*.

As for the official right extortion encompassed in the remaining RICO predicate acts, whatever errors of judgment the record may or may not disclose, there is no evidence whatsoever that petitioner intentionally engaged in any criminal acts.

The Government's case against petitioner on the charges arising out of the phony legislation entirely depended on the testimony of the FBI's undercover agent and Shahabian, who, unknown to petitioner, was co-opted by the Government in or about September 1987 — and immunized from prosecution in

May 1989. The case on the remaining five RICO predicates rested only on the totally subjective "impression" testimony of five professional "lobbyists."

1. The Theory of the Prosecution.

Under the Government's theory on Racketeering Act One of Count One and Counts Two, Three and Four, petitioner violated the official right clause by unlawfully accepting political contributions from the FBI totalling $20,000. But petitioner offered unrebutted testimony that these contributions were not made in return for an explicit (or implicit) promise or undertaking. And, Shahabian admitted without contradiction, that his periodic reports to Special Agent Brennan — the undercover agent given principal charge of the operation and whom the trial judge aptly labelled a "pretend victim" — to the effect that petitioner was undertaking "official action" in connection with the bill were all lies. Shahabian's testimony also demonstrated that petitioner made no promise whatsoever in exchange for the FBI's political donations. Indeed, petitioner did not even vote on A.B. 3773 when it passed the Senate August 24, 1986 by a vote of 33-0. In a word, the Government's entire case on these counts collapsed at trial.

The Government's case on Racketeering Acts Two through Six of Count One fares no better. Apparently sensing that its campaign fund raising case against petitioner seriously was at risk, the FBI began calling around the United States asking, according to one witness, "Do you know anything bad about Carpenter?" As with A.B. 3773, this fishing expedition was undertaken with no valid predicate. After about a year, the FBI — by "hook or crook" — found six witnesses willing to testify against Mr. Carpenter with respect to five wholly separate and distinct occurrences.

The Government's theory of these five predicates was that petitioner unlawfully "extorted" the reluctant witnesses — each one of whom sought to "lobby" petitioner about a legislative matter — by soliciting campaign contributions through promises of a *quid pro quo*. But each of the Government's witnesses testified that petitioner never asked for political money in exchange for legislative action. This evidence of the absence of an unlawful *quid pro quo* remained wholly unrebutted. Nonetheless,

the Court of Appeals erroneously let all of that pass by holding that petitioner may have engaged in an "official act" for Hobbs Act and RICO purposes if a properly instructed jury found that he was sending a "clear and unambiguous message" that he was "conditioning" his "support for legislation on the receipt of contributions . . ." (App. A 6a.) No Court ever has so held. The issue is one of first impression.[2]

REASONS FOR GRANTING THE WRIT

The decision below, in total disregard of the fundamental rule expressed in *McCormick*, conflicts in principle with the First Amendment's absolute protection of political fund-raising conduct and collides directly with the legislative history that underlay enactment of the Hobbs Act. It also is a perversion of the Congressional intent inspiring enactment of the RICO regime.

The ramifications of the Court of Appeals' interpretation of *McCormick* are, to say the least, extraordinary. It would give to every district judge or lay jury the power to engage in arm-chair psychoanalysis of the protected interplay between political donee and donor with no explicit guideline — other than the presence or

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[2]The contingent role of the "lobbyist" or "accessee" in determining whether the "message" is "clear and unambiguous" is another disturbing feature of the Court of Appeals' new test. Under the Court of Appeals' contrived "message" test, the psychological make-up of the potential "victim" — apparently to be determined on the basis of an inherently indeterminate assessment by the fact-finder — plays the pivotal role in enforcement of the Court of Appeals' new ban on "access" unlawfully granted or denied.

Where, as under the Court of Appeals' test, such assessments are made the basis of criminal prosecution, the test is unconstitutional because it demands that individual elected officials analyze the psychological profile of virtually every "lobbyist" she meets or greets under threat of criminal penalty. This is precisely why, we submit this Court crafted in *McCormick* the "explicit-promise-or-undertaking" test. It creates a bright line of criminal liability, one that gives fair notice of what is prohibited.

absence of a "nod" or a "wink" — to distinguish what is criminal conduct and what it is not.

But the First Amendment, of course, recognizes that the public life of every elected official depends upon receiving political donations. Just so, the Justice Department's written policy — blatantly ignored in this case — specifies that "campaign contributions will not be authorized as the subject of a Hobbs Act prosecution unless they can be proven to have been given in return for the performance or abstaining from an official act; otherwise any campaign contribution might constitute a violation." *9 Department of Justice Manual § 9-85A.306; p. 9-1938.134 (Supp. 1988-2)*. This policy recognizes that every campaign contribution is given on account of the official's office. It thus is the specific, identifiable, and unlawful *quid pro quo* that distinguishes what is a lawful contribution from what is not. Though this laudable policy was converted into case law by *McCormick*, it was disregarded totally by the Court of Appeals.

As we shall show, the decision below sanctioning such an amorphous standard is fundamentally at war with the settled law emanating from *McCormick*, and the rules shaping permissible applications of the Hobbs Act and RICO.

In sum, this case cuts to the heart of what protected campaign financing is all about. Is an elected official required, for just one example, to return a campaign contribution because it is accompanied by a Letter from a supporter stating that it is given because of the official's vote or stance on a particular issue? What is there to distinguish between such a contribution and one given by the contributor in total silence? Was petitioner, for another example, obligated to turn-away Brennan's unsolicited, no-strings-attached donation merely because Brennan's "company" sponsored a piece of legislation that, in petitioner's view, could not be stopped with "an ax?" Did the Hobbs Act, RICO, or the local bribery statute require petitioner to go to the police because he should have suspected that Brennan's contribution might be part of a "sting?" And, did the applicable law prohibit petitioner from discussing fund raising with "lobbyists" who were working from a more self-serving — perhaps even a politically hostile — agenda?

As so correctly noted in *McCormick*, "to hold that legislators commit the federal crime of extortion when they act for the benefit of constituents or support legislation furthering the interest of some of their constituents . . . is an unrealistic assessment of what Congress could have meant by making it a crime to obtain property from another, with his consent, 'under color of official right.'" (111 S.Ct. at 1816.) These issues are of fundamental importance if *McCormick* is to be given a uniform and pragmatic application to political fund-raising.

ARGUMENT

I.

THE HOBBS ACT'S OFFICIAL RIGHT CLAUSE IS CONSTITUTIONALLY VAGUE AND OVERBROAD ON ITS FACE AND AS APPLIED BY THE COURT OF APPEALS TO PETITIONER'S CONDUCT.

Petitioner squarely presented to the court below the question whether the Hobbs Act ever was intended by Congress to apply to the political fund-raising conduct attributed to him. The Court of Appeals ignored completely the argument. It clearly is ripe for resolution here.

This Court explicitly refused to decide in *McCormick* whether the Hobbs Act was "intended to apply to corruption involving local officials." (111 S.Ct. at 1814, N.G.) But, as Justice Scalia aptly observed in his concurrence, § 1951 "contains not even a colorable allusion to campaign contributions or *quid pro quos*." (*Id.* at 1818.) Since the Government sought in this case to use the Hobbs Act as the vehicle for imposing "criminal penalties in an area permeated by First Amendment interests, [c]lose examination of the specificity of the [Act] is required." *Marks v. United States*, 430 U.S. 188, 196 (1977).

The legislative history of the Hobbs Act gives no clue that Congress intended through the Act to regulate State and local

election practices, an area of local concern best left to the States.[3] The First and Fifth Amendments, of course, require much more than a clue. Congress may not criminalize First Amendment conduct by stealth.

The Hobbs Act's prohibition of extortion "under color of official right" originated in the Anti-Racketeering Act of 1934, Pub.L. No. 73-376, 48 Stat. 979. The Act made it a crime to "obtain[ ] the property of another, with his consent, induced by wrongful use of force or fear, or under color of official right." *Id.* § 2(d). Nothing in the legislative history illuminates the intended purpose of the official right clause, and there is no evidence that Congress intended that the Act should include within its prohibition the legitimate and bona fide campaign fund raising activity of elected office-holders and office-seekers. To the contrary, the legislative history overwhelmingly shows that Congress' sole purpose was to eliminate labor racketeering by establishing severe penalties for racketeering by violence, extortion or coercion. *See*, e.g., H.R. Rep. No. 1833, 73rd Cong. 2d Sess. 1-2 (1934) (House Report Anti-Racketeering Act of 1934) (Senate Report on Act).

The Anti-Racketeering Act was amended in 1946 by Pub.L. No. 79-486, § 1(c), 60 Stat. 420, popularly known as the Hobbs Act. The extremely limited purpose of the 1946 amendment was

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[3]*See* H.R. Rep. No. 1833, 73rd Cong. 2d Sess.2 (1934) (committee report on Anti-Racketeering Act); S.Rep. No. 532, 73rd Cong., 2d Sess. 1-2 (1934) (same); 78 Cong. Rec. 11,402-03 (1934) (Senate agrees to House amendments to Anti-Racketeering Act without debate); 78 Cong. Rec. 5734-35 (1934) (Senate passes Anti-Racketeering Act without debate); 78 Cong. Rec. 11,402-03 (1934) (amended Anti-Racketeering Act passed by House without debate); 89 Cong. Rec. 3228-29 (1943) (debate on H.R. 653, 78th Cong., 1st Sess., virtually identical to Hobbs Act) (remarks of Reps. Hobbs and Sumners concerning "color of official right" provision); H.R. Rep. No. 238, 79th Cong., 1st Sess. 1, 9, reprinted in 1946 U.S. Code Cong. Ser. 1360-1370 (committee report on Hobbs Act); S.Rep. No. 1516, 79th Cong. 2d Sess. 1-2 (1946) (same); 92 Cong. Rec. 7308 (1946) (Senate passes Hobbs Act without debate); 91 Cong. Rec. 11,899-922 (1945) (House debate and passage of Hobbs Act).

explained in detail in *United States v. Enmons*, 410 U.S. 396, 401-03 (1973):

> The predecessor of the Hobbs Act, § 2 of the Anti-Racketeering Act of 1934, 48 Stat. 979, proscribed, in connection with interstate commerce, the exaction of valuable consideration by force, violence, or coercion, "not including, however, the payment of wages by a bona-fide employer to a bona-fide employee. . . ." In *United States v. Local 807*, 315 U.S. 521, 86 L.Ed. 1004, 62 S.Ct. 642, this Court held that this exception covered the members of a New York City truck drivers union who, by violence or threats, exacted payments for themselves from out-of-town truckers in return for the unwanted and superfluous service of driving out-of-town trucks, and then demand payment from the owners and drivers in return for allowing the trucks to proceed into the city. The teamsters sometimes drove the arriving trucks into the city, but in other instances, the out-of-town truckers paid the fees but rejected the teamsters' services and drove the trucks themselves. In several cases there was evidence that, having exacted their fees, the city drivers disappeared without offering to perform any services at all. Id. at 526, 86 L.Ed. 1004. See also Id., at 539, 86 L.Ed. 1004 (Stone, C.J., dissenting). The Court held that the activities of the city teamsters were included within the wage exception to the Anti-Racketeering Act although what work they performed was unneeded and unwanted, and although in some cases their work was rejected.
>
> Congressional disapproval of this decision was swift. Several bills were introduced with the *narrow purpose of correcting the result in the Local 807 case*. HR 32, which became the Hobbs Act, 60 Stat. 420, eliminated the wage exception that had been the basis for the Local 807 decision. But, as frequently emphasized, on the floor of the House, the limited effect of the bill was to shut off the possibility opened up by the Local 807 case, that union members could use their protected status to exact payments from employees for imposed, unwanted, and superfluous services.

(Footnotes omitted.) (Emphasis supplied.) The several changes made in the 1946 amendment did not relate to the official right clause, which was incorporated, unchanged, into the Hobbs Act without comment.[4]

There is nothing in the relevant legislative history or case law to support the conclusion that the official right clause was designed or intended to regulate activity within the protected area of State campaign financing. To the contrary, the *Enmons* Court rejected the Government's invitation to expand the coverage of the Hobbs Act to proscribe the use of force to achieve legitimate collective-bargaining demands. The Court's analysis there is apt here:

> Even if the language and history of the Act were less clear than we have found them to be, the Act could not properly be expanded as the Government suggests — for two related reasons. First, this being a criminal statute, it must be strictly construed, and any ambiguity must be resolved in favor of lenity. *Secondly, it would require statutory language much more explicit than that before us here to lead to the conclusion that Congress intended to put the Federal Government in the business of policing the orderly conduct of strikes.* Neither the language of the Hobbs Act nor its legislative history can justify the conclusion that Congress intended to work such an extraordinary change in federal labor law or such an unprecedented incursion into the criminal jurisdiction of the States.

Id., 410 U.S. at 411. (Citations and footnotes omitted.) (Emphasis supplied.)

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[4]The remarks of Congressman Hobbs, the bill's sponsor, during the 1943 debate on HB H.R. 653, 78th Cong., 1st Sess., a bill virtually identical to the present Hobbs Act, demonstrate beyond argument that Congress envisioned a severely restricted scope for the official right clause. Congressman Hobbs declared: " 'Color of official right' means absence of right but pretended assertion of right. It could not possibly apply if there was any bona fide right; it applies only to pretended right." 89 Cong. Rec. 3228-29 (1943). Congressman Hobbs' statement, without more, justifies barring the reach of the Act to the charges invented against petitioner: Campaign contributions are not reached by the Act.

Similarly, this Court in *United States v. Bass*, 404 U.S. 336, 349-50 (1971), emphasized the absolute necessity for an unambiguous declaration of congressional intent where, as here, Federal prosecutors seek to use a criminal statue to expand Federal jurisdiction so as to "effect a significant change in the sensitive relation between federal and state criminal jurisdiction." (*Id.* at 349.)[5]

So it is clear from the language of the clause and its legislative history that the official right clause was not intended to regulate a State elected official's receipt of campaign contributions — money to which he is entitled under the First Amendment.[6]

In a nutshell, the Federal prosecutors in the Eastern District of California have no business meddling within the protected area of State campaign financing.[7]

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[5]So it was that, for at least 25 years after the Hobbs Act was passed, the Government itself contended that the statute required proof of coercion for any conviction. (Br. of United States in *McCormick*, at n. 16.) That interpretation absolutely precludes this prosecution.

[6]Pertinent, too, is the fact that, even after reenacted in the Hobbs Act in 1946, the official right clause "rested there virtually unnoticed" for 25 years. Ruff, *Federal Prosecution of Local Corruption: A Case Study in the Making of Law Enforcement Policy*, 65 Geo.L.J. 1171, 1183 (1977).

[7]Petitioner also specifically contends that, as applied to an elected office-holder, the Hobbs Act is unconstitutionally vague and overbroad. He relies on *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939); *Village of Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 498-99 (1982); *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972); *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921); *United States v. Cardiff*, 344 U.S. 174, 176-77 (1952); *Papachristou v. Jacksonville*, 405 U.S. 156, 162 (1972); *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940); *Village of Schaumburg v. Citizens for A Better Environment*, 444 U.S. 620, 636-37 (1980); and *Secretary of State of Maryland v. Joseph H. Munson*, 467 U.S. 947, 967 (1984). *See* Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U.Pa. L.Rev. 67 (1960), and Note, *The First Amendment Overbreadth Doctrine*, 83 Harv. L.Rev. 844 (1970).

In any event, ambiguity as to whether the Hobbs Act applies to the conduct of State election campaign financing "must be resolved in favor of lenity," *United States v. Enmons, supra*, 410 U.S. at 411 and *Rewis v. United States*, 401 U.S. 808, 812 (1971). Where, as here, "there are two rational readings of a criminal statute, one harsher than the other, [this Court is] to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987).[8]

Again, the contingent role of the lobbyist or donor in determining whether a fund raising strategy is criminal conduct makes no constitutional sense. In this case, the Government utilized the so-called "impression" testimony of FBI Agent Brennan and selected professional lobbyists against petitioner despite his objections. Quite apart from the obvious juridical fact that petitioner's state of mind may not be established by the "impression" testimony of the Government's witnesses, neither may such inherently indeterminate and purely subjective assessments be made the basis of a criminal prosecution for conduct within the protected area of campaign financing. That violates Due Process.

[8]"Application of the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal and strikes the appropriate balance between the legislature, the prosecutor, and the court in defining criminal liability." *Liparota v. United States*, 471 U.S. 419, 427 (1985). *See also Dowling v. United States*, 473 U.S. 207, 218 (1985) (conviction reversed because government failed to establish "a plain congressional intention" to reach the conduct charged in the indictment.); *Crandon v. United States*, 110 S.Ct. 997, 1001 (1990) ("it [was] appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage."); and *United States v. Carman*, 577 F.2d 556, 564-65 (9th Cir. 1978) (conviction overturned; rule of lenity applied to prevent the criminalization of mere "commercial dishonesty.")

"Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards [of political fund raising] for local and state officials," the official right clause should not be applied to the facts presented by this case. *McNally, supra*, 483 U.S. at 360.

Petitioner's convictions on all counts thus should have been reversed and the Indictment dismissed.

II.

THE DECISION BELOW IS IN DIRECT CONFLICT WITH *McCORMICK* BECAUSE IT FASHIONS RETROACTIVELY AN OVER-RESTRICTIVE AND A CONFUSING RULE FOR DETERMINING WHETHER THE GRANT OR DENIAL OF "ACCESS" CONSTITUTES AN "OFFICIAL ACT."

The term "official act" has not been defined by either the Congress or this Court. So, too, the term "access" is undefined.

Though the Court of Appeals declined to adopt the Government's contention that granting or denying a "lobbyist" "access" to present her views constitutes an "official act," the Opinion nevertheless holds that "access" in the "context" of a "clear and unambiguous message that a legislator is conditioning her support for legislation on the receipt of contributions" may translate into an "official act." (App. A 7a.) No court ever has so held. The issue is one of first impression.

Indeed, we are aware of no Hobbs Act case dealing specifically with "access" to — and favorable attention by — a legislator. Putting aside the important fact that the Indictment did not charge petitioner with unlawfully compelling self-proclaimed "lobbyists" to make political donations as a condition precedent to getting "access" to him, until now there was no predicting that the Hobbs Act would be used to criminalize the manner in which an elected official apportions his time. Even the Court of Appeals conceded that "[e]lected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time." (App. A 7a.) Yet, its decision twists quite the other way.

Just so, the Court of Appeals announced a retroactive rule whereby a legislator goes to prison whenever a "lobbyist" perceives "a clear and unambiguous message" that "granting or denying access" is "based on contributions." (App. A 7a.) How can a legislator prudently and safely afford to meet with anyone

— even a constituent — under such a slippery standard? Once one recognizes the uncontroversial fact that "lobbyists" always visit legislators to discuss "specific" legislation, it becomes all too clear that the rationale created by the Court of Appeals converts Federal judges and prosecutors into a corps of ethics police, commissioned to audit the ethical correctness of how elected officials apportion their time amongst constituents, "lobbyists," PACs, and myriad other visitors — perhaps even the Boy Scouts. Putting elected officials in this predicament imposes an unconstitutional condition on their protected campaign fund-raising activity. Unless, in other words, the Hobbs Act is read to prohibit meeting with any person who gives or withholds solicited campaign donations, the Court of Appeals' view of "access" gives no politician reliable guidelines to the boundaries of permitted activity.

The fatal flaw in the Court of Appeals interpretation of the term "official act" is its unexampled conclusion that "denial of access" constitutes on "official act" whenever (i) the "lobbyist or client" to whom access is denied desires to discuss "specific" legislation, and (ii) the reason for denial is tied to a perceived insufficiency of political contributions. (App. A 9a.) This "distinction" is a pure canard because it rests on the clearly fallacious assumption that legislators commit the Federal crime of extortion when they deny "access" shortly before or after they solicit — or fail to solicit — campaign contributions, but that no crime is committed if a legislator "acts for the benefit of constituents or support legislation . . . shortly before or after campaign contributions are solicited and received." *McCormick*, 111 S.Ct. at 1816.

Retroactive application of the Court of Appeals' newly discovered definition of an "official act" — hooked to the heretofore undefined concept of "access" — yields an unconstitutional application of the Hobbs Act. Manifestly, a criminal prohibition violates Due Process if "men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926). Such guessing was unavoidable when petitioner's new "access" crimes were perpetrated because neither Congress nor any court then had offered any guidance. No less than specific prerequisites

for what "access"-denial conduct constitutes extortions plainly is essential to fair notice. Here there was none.

In any event, there can be no doubt that, just as an "explicit promise or undertaking" is essential to criminalize the receipt of campaign contributions, so, too, explicitness is an absolute requirement for criminalizing the grant or denial of "access."

Whether or not the *McCormick* rule is conceptualized to apply to granting or denying "access," it does at the very least require that no politician be prosecuted for a Hobbs Act violation in connection with political fund-raising unless he trades an "official act" for an "explicit promise or undertaking." 111 S.Ct. 1816. The Court of Appeals standard simply does not comply with that prerequisite.

III.

THE RICO STATUTE IS UNCONSTITUTIONALLY VAGUE ON ITS FACE AND AS APPLIED IN THIS FIRST AMENDMENT CASE.

The decision below wholly ignored petitioner's properly proffered contention that the RICO regime cannot be reconciled with the First Amendment in a prosecution based upon the solicitation or receipt of political donations.

Numerous courts repeatedly have complained about the guesswork and confusion provoked by the vague language of the RICO statute since its adoption.[9] In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 109 S.Ct. 2893 (1989), for example, four Justices of this Court (Rehnquist, O'Connor, Scalia, and Kennedy),

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[9]*See Beauford v. Helmsley*, 843 F.2d 103, 104 (2d Cir. 1988), vacated, 865 F.2d 1386 (2d Cir.) (en banc), vacated 109 S.Ct. 3236 (1989) ("courts generally, and courts in the Second Circuit in particular, remain confused (and certainly confusing) in their construction of the statutes governing . . . RICO."), and *Old Time Enterprises, Inc. v. International Coffee Corp.*, 862 F.2d 1213, 1220 (5th Cir. 1984) ("RICO . . . is an unusually confusing and convoluted statute.")

unambiguously invited a constitutional challenge on vagueness grounds to Rico.

> *No Constitutional challenge to this law has been raised in the present case, and so that issue is not before us.* That the highest Court in the land has been unable to derive from this statute anything more than today's meager guidance *bodes ill for the day when that challenge is presented.*

Id. at 2909 (Scalia, J., concurring). (Emphasis supplied.)

Relatedly, the *H.J., Inc.* majority (Brennan, Marshall, White, Blackman, Stevens) *did not disagree*, but acknowledged the vagueness inherent in the language of the statute, stating that "the definitional problems that arise in interpreting RICO's pattern requirement *inevitably lead to uncertainty* regarding the statute's scope." *Id.* at 2901 n. 3 (Emphasis supplied). And, in *Fort Wayne Books, Inc. v. Indiana*, 109 S.Ct. 916 (1989), the Court let stand Indiana's "little RICO" statute as applied to obscenity offenses, but Justices Brennan, Marshall, and Stevens dissented on the ground that, though the *obscenity* statute might be constitutional, the State's RICO statute was unconstitutionally vague. *Id.* at 934-35 (Stevens, J., dissenting and concurring in part).[10] So there is every reason to believe that no less than seven Justices would have sustained a vagueness challenge to RICO.[11]

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[10]*Fort Wayne Books* stands for the proposition that a statute proscribing a "pattern" of criminal activity is impermissibly vague where, as in this case, the underlying predicate acts — the receipt of political donations in the absence of a specific, ascertainable *quid pro quo* — are themselves constitutionally infirm. As discussed above, the official right clause — the provision that served as the central predicate for petitioner's RICO convictions — is unconstitutionally vague on their face and as applied to petitioner within the protected area of campaign fund raising.

[11]The Third Circuit, furthermore, has recognized that the potential Due Process problems identified by Justice Scalia in *H.J., Inc.* are very much at issue within "the First Amendment context." *United States v. Pungitore*, 910 F.2d 1084, 1104-05 (3d Cir. 1990). The Court of Appeals, too, long ago acknowledged that a vague definition of the "pattern" element would render the RICO statute "unmanageable."

See Sedima S.P.R.L. v. Imrex Co., 473 U.S. 499, 501 (1985) (Marshall, J., dissenting).

In any event, in the context of this First Amendment case involving campaign financing, RICO constitutionally is insupportable. The Due Process Clause of the Fifth Amendment, of course, forbids Congress from enacting penal statutes that are so vague and indefinite as to deprive a person or ordinary intelligence of notice of the prohibited conduct, and from giving unfettered discretion to prosecutors. *Grayned v. City of Rockford*, 408 U.S., 104, 108-09. RICO — in particular, the "enterprise" and "pattern" clauses — wholly fails both of the *Grayned* vagueness tests — lack of fair notice and impermissible prosecutorial discretion. As petitioner's prosecution abundantly demonstrates, RICO vests unbridled discretion in prosecutors and juries. Worse, the statute gives no notice whatsoever of what conduct it prohibits.

Count One charges petitioner with "conducting the affairs of an enterprise through a pattern of racketeering," in violation of 18 U.S.C. § 1962(c). The two critically important elements of the statute — the existence of an "enterprise,"[12] and, most relevantly, given the views of all nine Justices in *H.J. Inc.*, the "pattern of racketeering"[13] — have no definition, much less a limiting one, in the statute at all. Nor does either of these

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United States v. Campanale, 518 F.2d 352, 364 (9th Cir. 1975), cert. denied, 423 U.S. 1050 (1076).

[12] "*Enterprise*" is defined effectively to cover any "entity" whatsoever. According to 18 U.S.C. § 1961(4), it includes "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

[13] "*Pattern-of-racketeering-activity*" — the element that has been confounding courts and juries for years — is defined merely to state the bare minimum. It requires at least two acts of racketeering activity [defined to include certain crimes]." Section 1961(5).

Where, as here, "First Amendment rights are involved, an even 'greater degree of specificity' is required" for the "pattern" and "enterprise" elements to withstand constitutional analysis. *Buckley, supra*, 424 U.S. at 77, quoting *Smith v. Goguen*, 415 U.S. 566, 573 (1974).

ambiguous statutory terms provide any notice of precisely what conduct is proscribed.[14]

In this case, the Government listed the FBI's political donation and five entirely separate, distinct, and isolated other encounters between petitioner and professional or quasi-lobbyists as the predicates constituting the "pattern." It is impossible to see how these sporadic contacts over a six-year period constitutionally may be said to constitute any kind of "pattern" of conduct at all. The interfaces appear to be related only because each involves petitioner and a "lobbyist." No other evidence of a "pattern" between these isolated instances of lobbying can be culled from the record.[15] In this confusing — but constitutionally protected context — the "pattern" leg of RICO simply is too vague to survive. No elected official "of ordinary intelligence" possibly may know what is a "pattern-of-racketeering" in the hurly-burly world of raising money to retain office.[16]

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[14]In effectively leaving the writing of the statute to the courts, RICO violates the constitutional principle of the separation of powers. *See, e.g., United States v. Kozminski*, 108 S.Ct. 2751, 2764 (1988) (case by case, essentially *ad hoc* delineation of criminal statute, not permissible).

[15]Under the Government's theory, campaign fund raising is an act of "racketeering" if money is so much as mentioned in a brief encounter with a lobbyist who demands to discuss a legislative matter with an elected official. So to avoid a RICO prosecution, the Government seems to be saying to elected officials that they can only meet with lobbyists whose clients have not contributed. Or can they only meet with lobbyists whose clients have not contributed lately? How lately? And what about those clients who might contribute in the future? How far in the future?

[16]Neither may an elected office-holder discern — within the protected area of campaign fund raising — whether his fund raising activities meet the confusing tests of "horizontal" and "vertical" relatedness, and, as well, whether his conduct may be perceived by a prosecutor to result in or pose a threat of continuity of criminal activity. *United States v. Long*, 917 F.2d 691, 697 (2d Cir. 1990).

This sub-set of "pattern" elements is so confusing that the Government made *no* effort to fit petitioner's conduct within it. That evidentiary void is not surprising since the Government could come up only with six

The "enterprise" element is no less vague. The charged "enterprise" here was petitioner's State Senatorial Office, but it could have been whatever the Government decreed; that is the constitutional flaw in the "enterprise" element. *U.S. v. Kozminski, supra.*

This first-impression prosecution well illustrates the constitutional defect of the RICO statute. No more than any judge of the Federal court system, lawyer who specializes in campaign financing or jury member, petitioner could not constitutionally be expected to understand that his Senatorial Office was a "racketeering enterprise," or that meeting with lobbyists for unrelated clients about unrelated agenda matters constituted a "pattern-of-racketeering-activity.[17]

Petitioner's conviction under Count One thus does not pass constitutional scrutiny. The RICO statute, both on its face and as applied in this highly unusual case, is unconstitutionally vague.

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instances in petitioner's 12-year political career which the Government believed were worthy predicates.

[17]The implication of petitioner's conviction for other elected officials who dare to meet with professional lobbyists against the twin backdrops of an impending or past re-election campaign and pending or proposed legislation is extremely ill-boding. Either the lobbyist or the elected office may be the "enterprise" and any two fund raisers or legislative bills may be the "pattern," a result absolutely precluded by the First Amendment.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

JERALD W. NEWTON
RICHARD P. CRANE, JR.
MERRICK SCOTT RAYLE
SCOTT J. REIN

Dated: August 21, 1992.

APPENDIX A

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL BRUCE CARPENTER,
Defendant-Appellant.
No. 90-10641
D.C. No. CR-90-0008-EJG

OPINION

Appeal from the United States District Court
for the Eastern District of California
Edward J. Garcia, District Judge, Presiding

Argued and Submitted
December 11, 1991 — San Francisco, California
Submission Vacated February 18, 1992
Resubmitted March 23, 1992

Filed April 9, 1992

Before: William A. Norris, Robert R. Beezer, and
Edward Leavy, Circuit Judges.

Opinion by Judge Norris

SUMMARY

RICO/Courts and Procedure

Reversing and remanding a district court judgment of conviction for racketeering, extortion, attempted extortion, and conspiracy to commit extortion, the court of appeals held that, under *McCormick*, it was error for the district court to instruct the jury that the government was not required to prove an explicit quid pro quo to establish "official right" extortion under the Hobbs Act.

Appellant Paul Bruce Carpenter, a former California state senator, was convicted of RICO violations involving racketeering, extortion, attempted extortion, and conspiracy to commit extortion. Carpenter allegedly had accepted a $20,000 campaign contribution from an FBI agent to ensure passage of California AB 3773. Other charges included instances in which Carpenter allegedly pressured lobbyists to make contributions to him. Each of these incidents was alleged to be attempted extortion under color of official right in violation of the Hobbs Act. Carpenter argued that the district court erred in instructing the jury that the government was not required to prove an explicit quid pro quo to establish "official right" extortion under the Act, and challenged the sufficiency of the evidence.

[1] Applying the Supreme Court decision in *McCormick v. United States* retroactively to this case, the court held that the district court committed reversible error in giving such instruction because it removed from the jury the requirement of an explicit quid pro quo, creating a possibility that Carpenter might have been convicted for activity that is not a crime. [2] In addition, the court rejected the argument that the explicitness requirement of *McCormick* could not be met unless an official like Carpenter had specifically stated that he would exchange official action for contribution. [3] The explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous. [4] Although in addition to explicitness, *McCormick* requires that the quid pro quo involve an "official act," the court held that granting or denying access to lobbyists based on levels of campaign contributions is not an "official act" and cannot, by itself, form the basis for a charge of extortion or attempted extortion under the Hobbs Act.

[5] Turning to the evidence, the court concluded that a rational jury could have found that Carpenter made an explicit promise to support AB 3773 and to intervene with his colleagues on behalf of the bill in exchange for a campaign contribution of $20,000. [6] The evidence also showed that Carpenter was clearly and unambiguously conditioning his support of AB 3773 on the receipt of contributions from lobbyists. [7] The evidence also showed that Carpenter refused to discuss specific legislation

for the explicit reason that he had not received sufficient contributions from lobbyists. [8] Carpenter's claim of government misconduct fell short of what was necessary to dismiss the indictment.

COUNSEL

Merrick Scott Rayle, Beverly Hills, California, for the defendant-appellant.

John P. Panneton, Assistant United States Attorney, Sacramento, California, for the plaintiff-appellee.

OPINION

NORRIS, Circuit Judge:

Former California state senator Paul B. Carpenter appeals his conviction on four counts of racketeering, extortion, attempted extortion, and conspiracy to commit extortion. Because the district court erred when it instructed the jury that no explicit quid pro quo was required to establish "official right" extortion under the Hobbs Act, we reverse Carpenter's conviction on all four counts.

I

On March 15, 1990, a federal grand jury returned an indictment charging Carpenter with four counts of racketeering, extortion, attempted extortion, and conspiracy to commit extortion. On August 3, 1990, a superseding indictment was filed containing the same charges. Count I of the superseding indictment charged Carpenter with racketeering in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1962(c), based on six predicate acts. The first predicate act involved Carpenter's alleged acceptance of a $20,000 campaign contribution from an FBI agent to ensure passage of AB 3773, which the indictment alleged to be a violation of California Penal Code § 86. The other five predicate acts involved separate instances in which Carpenter allegedly pressured lobbyists to make contributions to him. Each of these five acts was alleged to be

attempted extortion under color of official right in violation of the Hobbs Act, 18 U.S.C. § 1951(b)(2).

Count II of the superseding indictment charged that Carpenter's acceptance of $20,000 to ensure passage of AB 3773 constituted extortion under color of official right in violation of the Hobbs Act. Count III charged that Carpenter conspired with his aide John Shahabian to commit extortion under the Hobbs Act in connection with AB 3773. Count IV charged Carpenter with attempted extortion in violation of the Hobbs Act for trying to induce payment from a lobbyist for the California Correctional Peace Officer's Association.

The jury convicted Carpenter on all four counts. He was sentenced to concurrent prison terms of 12 years on the first three counts. The sentence for count IV was suspended and Carpenter was placed on probation for three years. This appeal followed.

II

Carpenter argues that the district court committed reversible error when it instructed the jury that the government was not required to prove an explicit quid pro quo in order to establish "official right" extortion under the Hobbs Act. If Carpenter is correct, we must reverse his conviction on all four counts. Counts II, III, and IV all charge violations of the Hobbs Act. Count I charges Carpenter with racketeering based on six predicate acts, five of which are Hobbs Act violations. Since the government must prove at least two predicate acts to constitute a "pattern" under RICO, *see* 18 U.S.C. § 1961(5), Carpenter's conviction on count I must be reversed if the Hobbs Act predicates are invalid.

In *McCormick v. United States*, 111 S.Ct. 1807 (1991), the Supreme Court held that receipt of campaign contributions would violate the Hobbs Act "only if the payments are made in return for an explicit promise or undertaking by the official to perform or not to perform an official act." *Id.* at 1816.[1] Although *McCormick*

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[1]This case involves not only alleged promises but also alleged threats involving official action, which will be common in cases of *attempted* extortion. *McCormick*'s requirements of explicitness and of a connection

was decided after the jury verdict in Carpenter's case, it applies retroactively to all cases pending on direct appeal. *United States v. Montoya*, 945 F.2d 1068, 1071 (9th Cir. 1991).

[1] In *Montoya*, we held that it was error to instruct the jury that "[t]he Government is not required to prove that the defendant demanded or directly solicited the payment made or that he offered anything specific in return for it." *Id.* at 1073. The instruction given in Carpenter's case is indistinguishable: "there need be no specific quid pro quo to establish extortion under color of official right; that is, the Government need not prove that the defendant promised to do anything in particular in return for the payment of money." This instruction was error because it removed from the jury *McCormick*'s requirement of an explicit quid pro quo. The error is not harmless because it created a reasonable possibility that Carpenter was convicted for activity that is not a crime. *Accord Montoya*, 945 F.2d at 1074. Accordingly, we reverse Carpenter's conviction on all four counts.[2]

III

Carpenter also contends that there was insufficient evidence to convict him on each of the four counts. We must address this contention to determine if retrial on any of the counts is barred by the Double Jeopardy Clause. *Montoya*, 945 F.2d at 1074. We will not hold that the evidence was insufficient if, "viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

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to an "official act" logically applies not only to promises but also to threats.

[2]We need not reach Carpenter's contention that the jury instructions were deficient in other respects or that the First Amendment would bar his conviction under California Penal Code § 86 or under RICO when a violation of § 86 is alleged as one of the predicate acts. We also need not address Carpenter's contention that he was denied his Sixth Amendment right to a jury trial when the district judge excused one of the jurors for cause.

A

[2] In addressing the sufficiency of the evidence in this case, the principal question is whether the evidence in this case, the principal question is whether the evidence was sufficient to meet the explicitness and "official act" requirements of *McCormick*. Carpenter argues that the explicitness requirement cannot be met unless an official has specifically stated that he will exchange official action for a contribution. We disagree. To read *McCormick* as imposing such a requirement would allow officials to escape liability under the Hobbs Act with winks and nods, even when the evidence as a whole proves that there has been a meeting of the minds to exchange official action for money.

[3] In our view, what *McCormick* requires is that the quid pro quo be clear and unambiguous, leaving no uncertainty about the terms of the bargain. We noted in *Montoya* that the explicitness requirement serves to distinguish between contributions that are given or received with the "anticipation" of official action and contributions that are given or received in exchange for a "promise" of official action. *Montoya*, 945 F.2d at 1073 (quoting *McCormick*, 111 S. Ct. at 1818 (Scalia, J., concurring)). When a contributor and an official clearly understand the terms of a bargain to exchange official action for money, they have moved beyond "anticipation" and into an arrangement that the Hobbs Act forbids. This understanding need not be verbally explicit. The jury may consider both direct and circumstantial evidence, including the context in which a conversation took place, to determine if there was a meeting of the minds on a quid pro quo. As we read *McCormick*, the explicitness requirement is satisfied so long as the terms of the quid pro quo are clear and unambiguous.

[4] In addition to explicitness, *McCormick* requires that the quid pro quo involve an "official act." *McCormick*, 111 S.Ct. at 1816. The government argues that granting or denying a lobbyist access to present her views constitutes an "official act." We disagree. *McCormick* refused to attribute to Congress an intent to criminalize behavior that is "unavoidable so long as election campaigns are financed by private contributions" and has "long been thought to be well within the law." *Id.* *McCormick* gave as an example the soliciting of contributions from constituents who

had recently benefited from legislation, *id.*, and the same may be said of granting or denying access to an elected official's time based on levels of contributions. As Carpenter's counsel brought out repeatedly at trial there are several times as many lobbyists in Sacramento as there are state legislators. Elected officials must ration their time among those who seek access to them and they commonly consider campaign contributions when deciding how to ration their time. This practice "has long been thought to be well within the law [and] in a very real sense is unavoidable." *Id.* Accordingly, we hold that granting or denying access to lobbyists based on levels of campaign contributions is not an "official act" within the meaning of *McCormick* and cannot, by itself, form the basis for a charge of extortion or attempted extortion under the Hobbs Act.

[5] We recognize, however, that granting or denying access based on contributions may occur in such a context that it sends a clear and unambiguous message that a legislator is conditioning his support for legislation on those levels of contributions. Under such circumstances, granting or denying access may be evidence from which a jury could find that a legislator was conditioning his support for legislation on the receipt of contributions. Agreeing to support legislation in return for contributions is entirely different from granting or denying access. Agreeing to vote for or against legislation in exchange for a contribution clearly falls within the ambit of the Hobbs Act, for voting is a legislator's quintessential "official act." Likewise, agreeing to intervene with one's colleagues to secure their support for legislation involves an "official act." The effectiveness of such intervention depends in large measure on a legislator's ability to exchange his support on future legislation for his colleagues' support on pending legislation he favors. Thus, the legislator's vote lies at the heart of this practice as well.

B

With these observations in mind, we consider the sufficiency of the evidence against Carpenter. We begin with Carpenter's convictions on counts II and III for extortion and conspiracy to commit extortion in connection with AB 3773. As part of an

undercover investigation, FBI agent Brennan posed as an Alabama businessman seeking a change in California law. Brennan met with Carpenter's aide John Shahabian several times between July and September of 1986 to discuss AB 3773.[3] Brennan asked "what it's going to cost" and Shahabian responded with a figure of $20,000. Shahabian told Brennan that Carpenter would be the best person to "front" the legislation. Shahabian testified that he later told Carpenter about AB 3773, that Brennan would need help solving legislative problems, and that Shahabian had suggested a contribution of $20,000. Shahabian testified that Carpenter responded that he would assist the bill through the Senate. In conversations with Brennan, Carpenter assured him that things were going smoothly and that Carpenter had the "right friends" on the Banking and Commerce Committee. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational jury could have found that Carpenter made an explicit promise to support AB 3773 and to intervene with his colleagues on behalf of the bill in exchange for a campaign contribution of $20,000. Accordingly, we reject Carpenter's argument that the evidence was insufficient to support his conviction on counts II and III.

C

We turn next to Carpenter's conviction for racketeering under count I of the indictment. Five of the six predicate acts alleged in count I had no connection to AB 3773 but rather involved separate instances in which Carpenter pressured lobbyists to make contributions to him. Each of these five acts was alleged to violate the Hobbs Act.[4] A conviction for racketeering under

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[3]As an unindicted co-conspirator, Shahabian's acts and statements in furtherance of the conspiracy may be attributed to Carpenter. *Pinkerton v. United States*, 328 U.S. 640, 646-47 (1946). Moreover, Carpenter explicitly told Brennan that Shahabian spoke for Carpenter.

[4]While Carpenter's activities in connection with AB 3773 were alleged to violate the Hobbs Act in count II of the indictment, they were alleged to violate only California Penal Code § 86 in count I.

RICO requires the government to prove at least two predicate acts beyond a reasonable doubt. *See* 18 U.S.C. § 1961(5).

[6] Testimony regarding four of these five predicate acts described essentially the same situation.[5] In each case a lobbyist met with Carpenter to discuss specific legislative action that was of interest to the lobbyist's client. Carpenter refused to discuss the legislation and instead reviewed the lobbyist's or the client's record of contributions to him. Carpenter called each meeting to a halt without giving the lobbyist a chance to discuss the legislative matter. The government asserts that Carpenter's refusal to give the lobbyists the chance to present their views on legislation was official action, which Carpenter explicitly conditioned on the receipt of contributions. As we have already noted, we reject to government's assertion that granting or denying access, by itself, constitutes an "official act." We recognize, however, that the denial of access in some situations may be probative circumstantial evidence on the issue whether the legislator's support is conditioned on the receipt of contributions. When a legislator refuses to discuss *specific* legislation for the explicit reason that a lobbyist or client has not made sufficient contributions, a rational jury could conclude that the legislator was clearly and unambiguously conditioning his support on the receipt of contributions. Viewing the evidence presented at trial in the light most favorable to the prosecution, we conclude that the evidence was sufficient on predicate acts two through five to meet the requirements of *McCormick*.

With respect to predicate act six, we conclude that the evidence was insufficient because the lobbyist, who was employed by Hamilton Test Systems, could not recall whether he was meeting with Carpenter to discuss a specific legislative matter. The lobbyist's testimony was sufficient for the jury to find that Carpenter was conditioning access to his time on the receipt of contributions

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[5]Predicate act two involved a lobbyist for the Eastern Grower's Association. Predicate act three involved a lobbyist for the Charles Drew Post-graduate Medical School. Predicate act four involved a lobbyist for American Medical International. Predicate act five involved lobbyists for the California Correctional Peace Officers' Association.

but no more, and conditioning access to one's time does not, by itself, constitute an "official act" under *McCormick*. However, since the RICO conviction may be sustained if only two of the predicate acts are proved beyond a reasonable doubt and since the evidence was sufficient to meet the requirements of *McCormick* for four of the predicate acts, we reject Carpenter's argument that the evidence was insufficient with respect to count I.[6]

D

[7] We turn finally to the sufficiency of the evidence with respect to count IV, which involved the same instance of pressuring lobbyists for the California Correctional Peace Officers' Association that forms the basis for predicate act five. The evidence is sufficient to meet the requirements of *McCormick* with respect to count IV for the same reason it is sufficient to establish that predicate act five was a Hobbs Act violation. The evidence shows that Carpenter refused to discuss specific legislation for the explicit reason that he had not received sufficient contributions. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that Carpenter was clearly and unambiguously conditioning his support for the legislation on the receipt of contributions. Accordingly, we reject Carpenter's argument that the evidence was insufficient with respect to count IV.

IV

[8] Carpenter also asks that we dismiss his indictment for outrageous government conduct, citing *United States v. Russell*, 411 U.S. 423, 431-32 (1973). This court has "interpreted *Russell* extremely narrowly." *United States v. Montilla*, 870 F.2d 549, 552 (9th Cir. 1989). Indeed, this court has dismissed an indictment

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[6]Carpenter's separate contention that the evidence is insufficient to prove a "pattern" is meritless. Viewed in the light most favorable to the prosecution, the evidence was clearly sufficient to establish both a relationship among predicate acts and the threat of continuity. *See H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239 (1989).

for outrageous conduct only once. *See Greene v. United States*, 454 F.2d 783 (9th Cir. 1971) (dismissing indictment for bootlegging where government had initiated contact with defendants, offered to supply necessary equipment and an operator for still, supplied defendants with large amount of sugar, and served as defendants' sole customer). Carpenter's claims of misconduct fall far short of what is necessary to dismiss the indictment.

V

For the reasons stated herein, Carpenter's convictions on counts I through IV are REVERSED and the case is REMANDED to the district court for further proceedings consistent with this opinion.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

PAUL BRUCE CARPENTER,
Defendant-Appellant.

C.A. No. 90-10641
D.C. No. CR S-90-088-EJG
(E.D. Calif., Sacramento)

Appeal from the United States District Court
for the Eastern District of California

BRIEF FOR APPELLEE

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official action are frequently discrete in their demands. While their message is unambiguous, it is not necessarily spelled out in so many words. There is no reason to believe that the Supreme Court in *McCormick* intended by the use of the word "explicit" to reject the unbroken chain of authority approving the evidentiary value of circumstantial and indirect evidence as well as reasonable inferences that may be drawn therefrom.

Each of the lobbyists who testified were sent a clear, unambiguous message by Carpenter that he would take or withhold official action on their bills based on their financial support. While the defendant did not directly say that he would vote for their legislation if he received money, the jury was able to conclude, as did the lobbyists, that a contribution would influence his official position. Moreover, it was abundantly clear that he would not even listen to lobbyists without a contribution and as former Assembly Member testified, granting or denying such access is an official act. (RT 605).

Carpenter thus clearly tied the payment of money in the form of campaign contributions to the conduct of his office as State Senator. Neither *McCormick* nor the Constitution require more.

Defendant also contends that the court erred when no instructions were given that distinguished a legitimate solicitation of a campaign contribution from an illegal request for a bribe. Initially, it should be noted that defendant's trial counsel never offered such a proposal.[11] Moreover, even under

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[11]Contrary to defendant's contentions, trial counsel did not object to the court's instructions on the Hobbs Act. While counsel offered an instruction on "access" which was rejected, the offer did not deal with *quid pro quo*. Since counsel did not object

APPENDIX C

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IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
PAUL BRUCE CARPENTER,
Defendant.

CR. NO. S-90-088-EJG

VIOLATIONS: 18 U.S.C. § 1962(c) — Racketeering; 18 U.S.C. § 1951 — Extortion Under Color of Official Right (Two Counts); 18 U.S.C. § 1951 — Conspiracy to Affect Commerce by Extortion Under Color of Official Right.

SUPERSEDING INDICTMENT

COUNT ONE: [18 U.S.C. § 1962(c) — Conducting the Affairs of an Enterprise through a Pattern of Racketeering]

The Grand Jury charges:

PAUL BRUCE CARPENTER,

defendant herein, as follows:

THE RACKETEERING ENTERPRISE
AND DEFENDANT

At all times relevant to this Indictment:

1. The Office of California State Senator for the 37th District was a governmental entity established by the California Constitution and the laws of the State of California.

2. The Office of Senator Paul B. Carpenter, California State Senator for the 37th District, was an enterprise as that term is defined in Title 18, United States Code, Section 1961(4), the activities of which affected interstate commerce.

3. Defendant PAUL B. CARPENTER assumed the office of State Senator for the 37th District in 1976 and served in that position at all times relevant to this indictment. In addition, as a State Senator, defendant PAUL B. CARPENTER was an employee of the State of California.

4. Defendant PAUL B. CARPENTER had authority over a staff of assistants and clerical workers who assisted him in the performance of his official duties. John Shahabian was a member of defendant PAUL B. CARPENTER's staff. In addition, other persons assisted defendant PAUL B. CARPENTER in matters connected to campaign fundraising and recordkeeping, and in the operation of his district office.

CALIFORNIA LAWS AGAINST BRIBERY

At all times relevant to this indictment:

5. There was in force and in effect a criminal statute of the State of California at section 86 of the California Penal Code which provided in pertinent part as follows:

> Every member of either of the houses composing the Legislature of this state who asks, receives or agrees to receive, any bribe, upon any understanding that his official vote, opinion, judgment or action shall be influenced thereby . . . is punishable . . . .

6. There was in force and in effect a criminal statute of the State of California at Section 7 of the California Penal Code which defined the word "bribe" as used in the California Penal Code as follows:

> The word "bribe" signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his or her action, vote, or opinion, in any public or official capacity.

7. The violation of California Penal Code Section 86 is punishable by imprisonment for more than one year and constitutes racketeering activity under the provisions of Title 18, United States Code, Section 1961(1)(A).

OBJECT AND CONDUCT OF THE RACKETEERING ACTIVITY

8. It was the object of the racketeering activity by the defendant to improperly use, as further specified in this count, the Office of Senator Paul B. Carpenter, California State Senator for the 37th District, as a vehicle for obtaining payments in the form of campaign contributions for the benefit of defendant PAUL B. CARPENTER.

9. From at least as early as approximately January 1980, through approximately September 1986, in the Eastern District of California, and elsewhere, the defendant PAUL B. CARPENTER, being a person employed by and associated with the Office of Senator for the 37th District, did knowingly and intentionally conduct and participate, directly and indirectly, in the conduct of the affairs of the Office of Senator Paul B. Carpenter, California State Senator for the 37th District, an enterprise engaged in and the activities of which affected interstate commerce, through a pattern of racketeering activity as that term is defined in Title 18, United States Code, Section 1961(1) and (5), consisting of:

A) Acts of asking, receiving, and agreeing to receive a bribe in violation of Section 86 of the California Penal Code;

B) Acts of extortion under color of official right, in violation of Title 18, United States Code, Section 1951.

PATTERN OF RACKETEERING ACTIVITY

10. The racketeering activities, as defined in Title 18, United States Code, Section 1961(1)(A) and (B), committed by the defendant in the Eastern District of California and elsewhere, are set forth below in paragraphs 11 through 16 of this count:

RACKETEERING ACT NUMBER ONE

11. In or about August and September 1986, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, knowingly and intentionally *asked for,* received, and agreed to receive a thing of value and advantage, present and prospective, upon an *understanding* that his official *vote,* opinion, judgment and action would be influenced thereby. Specifically, defendant PAUL B. CARPENTER asked for, received, and agreed to receive a payment upon an understanding that his vote and other action as a member of the California Senate would be influenced in connection with pending legislation, that is Assembly Bill number 3773, which would alter state law requirements governing certain investments by certain financial institutions, in violation of Section 86 of the California Penal Code, an act of racketeering as defined in Title 18, United States Code, Section 1961(1)(A).

RACKETEERING ACT NUMBER TWO

12. In or about January 1984, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, did knowingly and intentionally attempt to obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that he did attempt to induce under color of official right a payment from a representative of the Western Grower's Association, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951, an act of

racketeering as defined in Title 18, United States Code, Section 1961(1)(B).

RACKETEERING ACT NUMBER THREE

13. In or about May 1985, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, did knowingly and intentionally attempt to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that he did attempt to induce under color of official right a payment from a representative from the Charles Drew Postgraduate Medical School, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951, an act of racketeering as defined in Title 18, United States Code, Section 1961(1)(B).

RACKETEERING ACT NUMBER FOUR

14. In or about March 1984, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, did knowingly and intentionally attempt to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that he did attempt to induce under color of official right a payment from a representative of American Medical International, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951, an act of racketeering as defined in Title 18, United States Code, Section 1961(1)(B).

RACKETEERING ACT NUMBER FIVE

15. In or about May 1985, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, did knowingly and intentionally attempt to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18,

United States Code, Section 1951(b)(2), in that he did attempt to induce under color of official right a payment from a representative of the California Correctional Peace Officer's Association, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951, an act of racketeering as defined in Title 18, United States Code, Section 1961(1)(B).

RACKETEERING ACT NUMBER SIX

16. In or about the Fall of 1980, defendant PAUL B. CARPENTER, while a State Senator for the 37th District, did knowingly and intentionally attempt to obstruct, delay and affect commerce as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that he did attempt to induce under color of official right a payment from a representative of Hamilton Test Systems, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951, an act of racketeering as defined in Title 18, United States Code, Section 1961(1)(B).

All in violation of Title 18, United States Code, Section 1962(c).

COUNT TWO: [18 U.S.C. § 1951 — Extortion Under Color of Official Right]

The Grand Jury further charges:

1. The Grand Jury realleges and incorporates by reference the allegations contained in paragraphs One, Three, and Four of Count One of this Indictment.

2. In or about August and September 1986, within the Eastern District of California, defendant PAUL B. CARPENTER, as a Senator and employee of the State of California, knowingly and intentionally attempted to obstruct, delay and affect commerce, as that term is defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that the defendant,

PAUL B. CARPENTER, in connection with Assembly Bill 3773 did obtain a payment induced by him under color of official right, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951.

COUNT THREE: [18 U.S.C. § 1951 — Conspiracy to Affect Commerce By Extortion Under Color of Official Right]

The Grand Jury further charges:

1. The Grand Jury realleges and incorporates by reference the allegations contained in paragraphs One, Three, and Four of Count One of this Indictment.

2. From on or about August 1, 1986 to on or about September 30, 1986, within the Eastern District of California, defendant PAUL B. CARPENTER and John Shahabian, not charged herein, did unlawfully combine, conspire, confederate and agree to commit extortion, as that term is defined in 18 U.S.C. § 1951(b)(2), which extortion would affect commerce and the movement of articles and commodities in commerce, as that term is defined in 18 U.S.C. § 1951(b)(3), by obtaining and causing to be obtained money which was not lawfully due the defendant PAUL B. CARPENTER, in connection with Assembly Bill 3773, with the payor's consent being induced under color of official right, in violation of Title 18, United States Code, Section 1951.

COUNT FOUR: [18 U.S.C. § 1951 — Extortion Under Color of Official Right]

The Grand Jury further charges:

1. The Grand Jury realleges and incorporates by reference the allegations contained in paragraphs One, Three, and Four of Count One of this Indictment.

2. In or about May 1985, within the Eastern District of California, defendant PAUL B. CARPENTER, as a Senator and employee of the State of California, knowingly and intentionally attempted to obstruct, delay and affect commerce, as that term is

defined in Title 18, United States Code, Section 1951(b)(3), by extortion, as that term is defined in Title 18, United States Code, Section 1951(b)(2), in that the defendant PAUL B. CARPENTER, in connection with legislation affecting the California Correctional Peace Officers' Association, did attempt to induce a payment of money under color of official right, which payment was not due defendant PAUL B. CARPENTER or his office, in violation of Title 18, United States Code, Section 1951.

— FORFEITURES RELATING TO COUNT I

The Grand Jury further charges:

1. Paragraphs one through eleven of Count One of this indictment are hereby fully realleged and incorporated herein, as if set forth in full, for the purposes of alleging forfeitures pursuant to Title 18, United States Code, Section 1963.

2. Through the aforesaid pattern of racketeering activity the defendant, PAUL B. CARPENTER, has acquired and maintained interests in, and has property constituting, or derived from proceeds obtained, directly or indirectly, from racketeering activity in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the Unites States as of the date they were acquired, maintained, and utilized pursuant to Title 18, United States Code, Section 1963(a)(1) and (3). The United States intent to forfeit includes, but is not limited to, the defendant's interest in the following assets or the proceeds thereof:

a. All right, title and interest in the $20,000 obtained in racketeering act one from a representative of Gulf Shrimp Fisheries which was provided on the dates and in the amounts listed below through checks drawn on a Gulf Shrimp Fisheries account:

Date	Amount
August 12, 1986	$10,000
August 14, 1986	5,000
September 23, 1986	5,000

b. Any other interests or monies obtained in violation of Title 18, United States Code, Section 1963, through the violation of Title 18, United States Code, Section 1962, as set forth in this indictment.

A TRUE BILL.

_____

Foreperson

_____

DAVID F. LEVI
United States Attorney